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No. 03-1230

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC. and USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF OF AMICI CURIAE DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION; CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY; ECONOMY TRANSPORT, INC.; MASON & DIXON LINES, INC.; ROMEO EXPEDITORS, INC.; WESTLAKE TRANSPORTATION, INC.; VANDERKOOI CARRIERS, INC.; GERIG'S TRUCKING & LEASING, INC.; AND BEST WAY EXPRESS, INC. IN SUPPORT OF THE PETITIONERS

ROBERT E. MCFARLAND
FOSTER, SWIFT,
COLLINS & SMITH, P.C.
32300 Northwestern Highway,
Suite 230
Farmington Hills, MI 48334
(248) 539-9900

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI CURIAE

Deeco Services, Inc., d/b/a Deeco Transportation; Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company; Economy Transport, Inc.; Mason & Dixon Lines, Inc.; Romeo Expeditors, Inc.; Westlake Transportation, Inc.; VanDerKooi Carriers, Inc.; Gerig's Trucking & Leasing, Inc.; and Best Way Express, Inc. respectfully submit this brief as amici curiae in support of the Petitioners American Trucking Associations, Inc. and USF Holland, Inc.[1] The amici are all motor carriers operating in interstate commerce pursuant to authority granted them by the former Interstate Commerce Commission, now administered by the Federal Motor Carrier Safety Administration of the United States Department of Transportation. Three of the amici are based in Indiana (Gerig's in Fort Wayne and Westlake and Best Way in Vincennes) and a fourth in Florida (Economy in Tampa), while the remainder of the amici are based in Michigan. The amici have also operated in Michigan intrastate commerce. All of the amici pay the $100 fee upon trucks conducting intrastate operations. All of the amici were named class representatives in the underlying action before the Michigan Court of Claims.

The $100 annual levy upon each truck conducting intrastate operations by Michigan transgresses the Commerce Clause of the United States Constitution. That intrastate levy constitutes a continuing burden on the

[1] Pursuant to Rule 37.6, amici certify that no counsel for any party in No. 03-1230 or No. 03-1234 authored this brief in whole or in part. No persons other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

interstate operations of the amici. That intrastate charge has drastic implications for the Michigan-based members of the amici, as well as for the non-Michigan based members, all of which have conducted both interstate and Michigan intrastate operations. The intrastate and interstate operations of the motor carriers are inextricably intertwined to maximize operating efficiencies and fleet utilization. Congress in 1994 recognized this when it found that intrastate economic regulation burdened INTERSTATE commerce, and preempted the same. Yet, the Michigan $100 annual fee upon each truck conducting intrastate operations is not in any way apportioned to the amount of Michigan intrastate activity conducted by a carrier. The former economic regulatory barriers to entry in the truck transportation industry have been removed by deregulatory acts of Congress affecting both interstate and intrastate transportation. If the Michigan intrastate fee is allowed to stand, it will serve as an invitation for all of the states to construct a new barrier through the enactment and imposition by other states of fees similar to Michigan's, thereby inhibiting interstate commerce. Respondents' counsel, in oral argument before the Michigan Court of Appeals in December of 2002, estimated that $75,000,000 was then at issue in this case alone.[2] Accordingly, amici urge this Court to find the $100 fee upon trucks conducting intrastate operations to be a burden on

[2] Presumably, that $75,000,000 figure included both the challenged Michigan intrastate fee in this case and the challenged Michigan interstate fee in Case No. 03-1234. Also, the Respondents' estimate could not have taken into account those fees levied toward the 2004 and 2005 calendar years, and may not have included the amount for 2003 (the fees are collected for the next calendar year by December 31 of the prior year).

interstate commerce and violative of the United States Constitution's Commerce Clause.

SUMMARY OF ARGUMENT

The motor carrier amici have all conducted combined interstate/intrastate operations in Michigan, as well as in other states. These operations are extensive geographically. The Michigan intrastate portion of those operations is only a fraction of these carriers' overall operations, which involve operations in interstate commerce, as well as intrastate operations in other states, and, for certain carriers, foreign commerce involving Canada. The interstate authority held by these carriers is, in fact, national in scope. Yet, the amici carriers pay the same $100 annual fee per truck pursuant to the intrastate fee statutory provision at MCL 478.2(1), regardless of the proportion of Michigan intrastate activity to the carriers' overall operations, because the Michigan fee is a flat annual charge. It is the same kind of flat annual charge that this Court has found to offend the Commerce Clause in *American Trucking Associations, Inc. v. Schiener*, 483 U.S. 266 (1987). This unapportioned fee is a burden on interstate commerce. It should be struck down.

ARGUMENT

I. AS THE AMICI ARE ALL MULTI-STATE BUSINESSES, THE ASSESSMENT OF THE FLAT FEE UPON THEM DOES NOT CONSTITUTE FAIR APPORTIONMENT OF THE FEE.

Each of the amici is a multi-state business. Their motor vehicle fleets travel over the highways of Michigan, operating in both interstate and intrastate commerce. They also operate over the highways of other states in interstate commerce, in intrastate commerce, and, in the case of some of the amici, in foreign commerce (over the highways of Canada). The same equipment of these motor carriers is used to operate in both intrastate and interstate commerce. When a shipment needs to be picked up, it makes economic sense, from an efficiency as well as a customer-service standpoint, to dispatch the closest unit with available capacity to pick up a shipment at a consignor's address and commence its journey toward destination, whether that unit is loaded with intrastate freight and/or interstate freight or empty, and whether or not the new shipment is of an interstate character or intrastate character. The motor carrier fleets of the amici are constantly being used in both interstate and intrastate capacities (and, with respect to intrastate capacities, in Michigan as well as other states). If carriers were required to dedicate portions of their fleet to either interstate or intrastate commerce (and, in the case of intrastate commerce, to intrastate commerce in particular states), the operational and service inefficiencies would be mind-boggling. The multi-state nature of the amici's operations is further affected by the character and consistency of Michigan's economy and geography, with the largest percentage of its population lying within 100 miles of its

southern borders with Indiana and Ohio, and its automobile industry activity tied to suppliers and plants located in Canada, Mexico, New York, Pennsylvania, Ohio, Indiana, Illinois, and Wisconsin, as well as other more distant states and overseas locations.

Despite the multi-state nature of the amici's business, however, they must pay the levy of $100 per truck per year, regardless of the amount of their activity in Michigan intrastate commerce. The less significant is a carrier's intrastate operations in Michigan, the greater is the burden of the Michigan intrastate fee.

Further, operating as they do in a multitude of states, the amici carriers would face a staggering cost if other cash-starved states adopted a Michigan-like fee structure for the ostensible privilege of providing intrastate transportation in a particular state. The wider the carrier's operations, the greater would be that burden – up to $4,800 a year per truck for a carrier with operations across the continental United States.[3] A levy of that magnitude constitutes a ponderous burden on interstate commerce and would undoubtedly lead to the making of economic choices as to where and whom to serve, protecting intrastate markets from competition thereby. The free flow of commerce would be impeded.

To prevent the imposition of state taxes which violate the Commerce Clause, this Court articulated the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274,

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[3] Of course, this assumes the states would only levy a $100 fee like Michigan. If the states charged more than $100, the burden would become correspondingly greater.

279 (1977), in which it was held that a state tax would be unconstitutional unless it:

> . . . is applied to an activity with a substantial nexus with a taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.

That a flat tax on interstate truck transportation could not meet the *Complete Auto* test was established by *Schiener*, which struck down Pennsylvania's "marker fee" as well as "axle tax."

The Michigan flat fee is not fairly apportioned consistent with *Complete Auto*. Certainly, when the internal consistency of this intrastate fee is examined, in line with the decision of this Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995), it could not be clearer that Michigan is grabbing more than its fair share of interstate transactions from carriers with multi-state businesses, such as amici.[4]

II. THE MICHIGAN INTRASTATE FEE DISCRIMINATES AGAINST MULTI-STATE CARRIERS, SUCH AS AMICI.

Any multi-state carrier, i.e., one conducting interstate and/or foreign operations, which also conducts intrastate

[4] An Indiana-based carrier conducting both interstate and intrastate operations in Michigan but deriving only three percent of its overall revenues from Michigan intrastate commerce, still pays the flat $100-per-truck fee to Michigan, just as does the Michigan-based carrier operating only in Michigan intrastate commerce. This demonstrates the manner in which the Michigan flat tax is an unapportioned anchor on interstate commerce.

operations in Michigan, is discriminated against. This is because it must pay the $100 per truck per year for the privilege of conducting intrastate operations regardless of the extent to which it conducts intrastate operations. If it does not register its fleet for Michigan intrastate operations, it threatens the quality of its service. This is because a carrier with an empty unit in Kalamazoo, Michigan, for example, designated interstate only, could not pick up an urgent shipment destined for Detroit, because the unit had not been registered through payment of the intrastate fee. The transportation world does not work in such a compartmentalized fashion.

Yet, the only way for a carrier to maximize the benefit of the intrastate fee is to limit a carrier's operations to Michigan only. The amici carriers, being all multi-state businesses, can never make "full use" of the intrastate levy that has been imposed upon them in Michigan. This intrastate fee, accordingly, cannot be interpreted in any way in which it is not discriminatory. It is not the degree of discrimination which renders the fee unconstitutional, but rather the discrimination itself. Because that discrimination exists, this fee should be adjudged unconstitutional under the Commerce Clause, and the decision of the Michigan Court of Appeals reversed.

Discriminatory barriers to the provision of efficient and economical intrastate/interstate truck service by multi-state carriers should be eliminated, not encouraged. Yet, Michigan seeks to maintain its barrier here. Congress, upon passage of the Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, Sec. 601, 108 Stat. 1605 (1994), made the particular finding that:

> The regulation of intrastate transportation of property by the states has
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers.

The continued imposition by Michigan of an unapportioned fee for the conduct of intrastate operations within its borders similarly burdens and obstructs interstate commerce in a pernicious way that violates the Commerce Clause. This discrimination can only be ended by holding that such a fee is unconstitutional.

CONCLUSION

For the reasons stated, the Court should hold that the Michigan $100 flat fee upon trucks conducting intrastate operations runs afoul of the Commerce Clause of the United States Constitution and reverse the decision of the Michigan Court of Appeals.

Respectfully submitted,

ROBERT E. MCFARLAND
FOSTER, SWIFT, COLLINS & SMITH, P.C.
32300 Northwestern Highway,
Suite 230
Farmington Hills, MI 48334
(248) 539-9900

Counsel for Amici Curiae